



U.S. Department of Justice
Civil Division
Federal Programs Branch
1100 L Street NW
Washington, DC 20005

By ECF

October 23, 2018

The Honorable Jesse M. Furman
United States District Court for the Southern District of New York
40 Foley Square
New York, New York 10007

Re: *State of New York v. U.S. Department of Commerce*, No. 18-cv-2921

Dear Judge Furman:

Plaintiffs' motion for leave to present live direct examination testimony from six witnesses (ECF No. 386¹) should be denied.²

Direct testimony by written affidavit from all witnesses within each party's control—in accordance with the Court's standard practice in bench trials—would streamline the trial considerably and conserve judicial resources. "The use of written testimony 'is an accepted and encouraged technique for shortening bench trials.'" *In re Adair*, 965 F.2d 777, 779 (9th Cir. 1992) (per curiam) (citation omitted); *accord Ball v. Interoceanica Corp.*, 71 F.3d 73, 77 (2d Cir. 1995) (per curiam). Plaintiffs have not provided estimates of the length of these six witnesses' proposed live direct examination testimony, preventing the Court from gauging exactly how much longer the trial would be if their request were granted. Nevertheless, several additional trial days is a conservative estimate since, as Plaintiffs acknowledge, four of the witnesses are experts whose testimony will be "complex" and "technical." Pls.' Mot. at 1, 3, ECF No. 386.

Besides streamlining the trial, requiring these witnesses' direct testimony by written affidavit would give the Court time to digest their testimony, terminology, and methodology before live cross-examination. That is likely to be especially helpful here given the complex and technical nature of these witnesses' anticipated testimony. Direct testimony by written affidavit would also allow the Court to consider the full context of each witness's direct testimony when resolving objections at trial.

Finally, allowing Plaintiffs to present live direct testimony from these witnesses would be unfair to Defendants. All defense direct testimony will be presented by written affidavit, served 10 days before trial, giving Plaintiffs ample time to formulate evidentiary objections to that testimony. By contrast, allowing Plaintiffs to present live direct testimony from six witnesses would require Defendants to object on the spur of the moment, without the same benefit of reflection that Plaintiffs will have.

¹ For the Court's convenience, citations to docket entries and legal authorities in the PDF version of this letter brief are hyperlinked to the cited authorities in ECF and Westlaw, respectively.

² Defendants intend to move to exclude the testimony of one of these witnesses, Lisa Handley.

Plaintiffs contend that live direct testimony from these six witnesses would allow the public to learn about the case, suggesting they intend to use these proceedings as a publicity event. Pls.' Mot. at 1, ECF No. 386. But educating the public is not the primary function of trials. Trials are held "for the solemn purpose of endeavoring to ascertain the truth." *Estes v. State of Texas*, 381 U.S. 532, 540 (1965). In any event, the public can learn about the case just as well if these witnesses' direct testimony is presented by written affidavit because those affidavits will be part of the record and will be publicly available.

The motion should therefore be denied. If, however, the Court permits Plaintiffs to present live direct testimony from these six witnesses, Defendants respectfully ask that they be permitted to present live direct testimony from Dr. John M. Abowd, the Census Bureau's Chief Scientist.

Dated: October 23, 2018

Respectfully submitted,

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